

**STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD**

EDWARD J. GIBBONS,

Charging Party,

v.

OXNARD EDUCATORS ASSOCIATION,

Respondent.

Case No. LA-CO-834-E

PERB Decision No. 1424

March 1, 2001

Appearances: Edward J. Gibbons, on his own behalf; California Teachers Association by Roberto M. Gallegos, Regional Resource Representative, for Oxnard Educators Association.

Before Amador, Baker and Whitehead, Members.

**DECISION**

BAKER, Member: This case comes before the Public Employment Relations Board (PERB or Board) on appeal by Edward J. Gibbons (Gibbons) from a Board agent's dismissal of his unfair practice charge. The charge alleged that the Oxnard Educators Association (OEA) violated the Educational Employment Relations Act (EERA)<sup>1</sup> in breaching its duty of fair representation by refusing to arbitrate legitimate grievances and disregarding and refusing to enforce specific contract provisions. Specifically, Gibbons claims that when contacted by the Oxnard School District (District), OEA effectively recommended his transfer by stating that seniority was the sole criterion that should be used for a reassignment, even though the contract between OEA and the District lists multiple criteria and that the District could use "any or all" of the criteria.

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<sup>1</sup>EERA is codified at Government Code section 3540 et seq.

The Board has reviewed the entire record in this case. Based upon this review and the following discussion, the Board dismisses Gibbons' charge as untimely.

### FACTUAL SUMMARY

Gibbons was employed as a teacher with more than 10 years of service with the District and was a member of the OEA. Included in the record is an excerpt from the collective bargaining agreement between OEA and the District covering transfers and reassignments.

On May 28, 1998, Gibbons was informed that he was being reassigned within Fremont Intermediate from a position teaching six periods of physical education to a 4/2 position teaching four periods of physical education and two periods of history. A teacher with more seniority in the District replaced Gibbons in this position. The replacement teacher possessed a waiver to teach physical education. The replacement teacher had close friendships with the two remaining teachers in the physical education department at Fremont Intermediate who were former union representatives. When Gibbons refused the reassignment, he was involuntarily transferred from Fremont Intermediate to Haydock Intermediate beginning the following school year.

Gibbons asserts that he was reassigned because the teacher who replaced him had more seniority. The OEA stated in its response to the instant charge that at the time of Gibbons' reassignment, all other teaching assignments were filled contractually on the basis of seniority. Article VIII of the collective bargaining agreement between OEA and the District provides that involuntary transfers or reassignments may be initiated by District management when necessary or appropriate and that in effectuating such transfers,

... the District shall not act arbitrarily, capriciously, or without basis in fact and shall follow and apply any or all of the criteria listed below:

- a. Legal requirements of the District;

- b. Credential(s), individual training, teaching experience;
- c. Seniority in the District;
- d. Educational needs of the school or department to which the unit member is transferred or reassigned;
- e. Unit member's preference.

Immediately after his May 28, 1998 reassignment, Gibbons attempted to discuss the reasons for the reassignment with Fremont Intermediate Principal Edmundo Chavez (Chavez). Chavez refused to give Gibbons the reason(s) for the reassignment. Article VIII, Section 4 of the parties' contract provides that in the event of a reassignment or involuntary transfer the employee, "shall be advised of the reasons therefor, in writing seven (7) calendar days prior to the transfer or reassignment." Gibbons filed a grievance on July 10, 1998 seeking the reasons for his reassignment. His grievance was denied at the first level as untimely. At the second level the denial based on untimeliness was affirmed. Gibbons received no response at the third level. Gibbons then submitted the grievance to OEA at the fourth level. Pursuant to the contract, at the fourth level, OEA had the exclusive authority to decide whether to request arbitration of the grievance.

On August 7, 1998, Gibbons met with his union building representative Joe Murphy and with Don Baer (Baer) and Sandy Cooluris-Weltz of the OEA to determine if OEA would request arbitration of his grievance. At that meeting OEA determined and informed Gibbons as a fourth level response it would not pursue the grievance any further. According to Gibbons' amended charge Baer "determined that OEA would not pursue the grievance any further because seniority was always used as the determining factor in all reassignments and transfers, and that my principal, Mr. Chavez, was under no obligation to give me any reasons in writing."

Between July 1998 and May 1999, Gibbons repeatedly attempted to get a reduced work schedule at his new school because he needed to care for two disabled family members. In

May and June of 1999, Gibbons took six weeks off of work due to his own health problems. On July 13, 1999, Gibbons filed a complaint with the Department of Fair Employment and Housing.

In December of 1999, Gibbons filed a complaint with the District against Chavez over his reassignment and transfer. Between December 1999 and April 2000 Gibbons pursued this complaint, culminating with a formal closed door presentation before the District Board of Trustees. According to Gibbons, the District Board agreed the reinstatement and transfer criteria were not applied correctly in his case, "but did nothing to deal with the unfair grievance process and the problem of Mr. Chavez not doing his duty."

Gibbons' original PERB charge asserted that he has been very active in pursuing the matter to the best of his ability and that his family's and his own health problems made this a difficult situation. He claims he contacted seven lawyers and that not one of them was willing to take on the OEA or the District, and not one of them had heard of PERB.

#### BOARD AGENT'S ANALYSIS

The Board agent's warning letter informed Gibbons that his charge was untimely and even if timely, failed to state a prima facie case of the OEA's failure to fairly represent him. The Board agent concluded that the six month statute of limitations began to run on August 7, 1998 when OEA informed Gibbons it would not pursue his grievance further. As the Board is dismissing the charge based on its untimeliness, it is not necessary to review the Board agent's analysis of the remainder of the charge.

Gibbons responded to the timeliness issue in his amended charge. In his amended charge Gibbons claims that during a May 19, 2000 meeting with the District's Assistant Superintendent of Instruction, Connie Sharp (Sharp), Sharp told him that Chavez, "had told her he had gone to the Union to get its approval of my reassignment and transfer, but would rather

have kept me in my original position." The May 19, 2000 conversation with Sharp prompted Gibbons to recall a telephone conversation he had with Chavez in December of 1999. During that call Gibbons asked Chavez why he had not given Gibbons the reason for the reassignment and eventual transfer in May of 1998. According to the amended charge, Chavez said, "I thought I did everything right. I went to the union and they told me what to do. I really would have rather had you for the position."

The Board agent found that Gibbons was put on notice that the OEA was involved in making decisions concerning reassignment and transfers during the December 1999 conversation with Chavez. The Board agent concluded that the statute of limitations on the new aspect of Gibbons' charge began to run as of December 19, 1999. Because he filed his original charge on May 22, 2000, the Board agent found the amended charge falls within the requisite six month statute of limitations. The dismissal letter went on to dismiss the charge for the failure to state a prima facie case.

### DISCUSSION

On appeal, Gibbons argues the Board agent erred in not finding a prima facie violation of the duty of fair representation. Gibbons argues that OEA's failure to enforce its own rules (the parties' contract), with the evident acquiescence of the District, was arbitrary and in bad faith. As Gibbons' charge is untimely, it is not necessary to address the merits of his appeal.

Gibbons knew on August 7, 1998 that OEA would not process his grievance requesting the reasons for his reassignment any further. It was not until December 1999, some 16 months later, that he pursued a further challenge to the same reassignment and transfer through a different process, a District complaint procedure. Upon utilizing this complaint procedure he immediately learned for the first time that OEA discussed his reassignment with the District before the decision to reassign him was made. Gibbons' charge alleges that OEA's role in

advising the District that seniority should be the sole basis for determining reassignments constitutes an unfair practice. The alleged unfair practice in this case therefore occurred sometime prior to May 28, 1998.

PERB has indicated that the six-month limitation period does not necessarily begin to run when an unfair practice occurs. PERB cases trigger the running of the period of limitations from when the charging party "knew or should have known of the alleged unlawful conduct." (Gavilan Joint Community College District (1996) PERB Decision No. 1177.) When a charge has been filed more than six months after an alleged unfair practice has occurred, the burden is on the charging party to prove both that it first knew and that it first "should have known" about the alleged conduct within the six months before the charge was filed.

In the instant case, Gibbons asserts that he did not know that OEA had influenced the District to use seniority as the sole criterion in reaching the decision to reassign him until he spoke to Chavez in December 1999. His charge was filed within six months of this conversation, therefore Gibbons meets the first part of the test.

The second part of the test is whether Gibbons "should have known" about the alleged conduct. In cases in which individual employees have filed charges alleging that employee organizations violated the duty of fair representation, PERB has held that the limitation period begins to run when an employee "in the exercise of reasonable diligence" knows or should know that further assistance from the organization is unlikely. (California School Employees Association (LaFountain) (1992) PERB Decision No. 925; International Union of Operating Engineers, Local 501 (Reich) (1986) PERB Decision No. 591-H.) Although his allegation against the union is slightly different because it is the OEA's action in discussing his transfer with the District which is challenged as an unfair practice, a similar standard requiring Gibbons

to "exercise reasonable diligence" in pursuing and investigating his claim against OEA is appropriate.

The record does not support that Gibbons exercised reasonable diligence. There is nothing in the record to indicate that Gibbons took any action to follow-up on the August 7, 1998 decision of OEA not to request arbitration of his grievance for over 16 months. Similarly, he took no action regarding the District's decision to reassign and eventually transfer him for over 16 months. On August 7, 1998, OEA told Gibbons it would not arbitrate his grievance because seniority was always used as the determining factor in all reassignments and transfers, and that his principal was under no obligation to give him any reasons for the reassignment in writing. As the OEA was straightforward with Gibbons, Gibbons knew on August 7, 1998 that OEA thought seniority should be the basis for evaluating reassignments despite the contract providing for several other criteria for possible consideration. Gibbons never filed a grievance over the reassignment or the transfer. Gibbons did not pursue investigating his claim or take any action regarding this matter for over 16 months.

In his charge, amended charge, and appeal, Gibbons makes it clear that his grievance sought only the reasons for his transfer so that he might have a basis to challenge the reassignment and/or transfer through the grievance process. It is troubling that he did not file an unfair practice charge against the OEA for failing to request arbitration of his grievance or otherwise pursue his claim either with or against OEA. Similarly, he did not file a grievance objecting to the substantive decision to reassign or transfer him. Had he pursued either of these in a timely fashion or in a continued effort to protect his rights, he would have discovered OEA's alleged role in his transfer.

If Gibbons' claim is allowed to stand as timely, it would require the Board to accept Gibbons not taking any action to further pursue his challenge against the reassignment and transfer or further investigate or pursue his claim against OEA for its alleged failure to represent him for over 16 months. Gibbons had a duty to exercise reasonable diligence in investigating his claim. In this case the unfair practice occurred prior to May 1998. A reasonably diligent investigation of his claim, including the filing of an unfair practice charge when the OEA refused to seek arbitration of his grievance, or the filing of a grievance over the reassignment or transfer, would have uncovered this alleged unfair practice.

In sum, Gibbons has failed to prove that even with the exercise of reasonable diligence, he could not have reasonably discovered the alleged unfair practice until six months before the charge was filed. His charge is, therefore, dismissed as untimely.

#### ORDER

The unfair practice charge in Case No. LA-CO-834-E is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Amador and Whitehead joined in this Decision.